No. 10110

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

ROBERT EARL HOPPER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S PETITION FOR A REHEARING AND APPLICATION FOR STAY OF ISSUANCE OF MANDATE

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TO THE HONORABLE WILLIAM DENMAN, CLIFTON MATHEWS, AND ALBERT LEE STEPHENS, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

The appellee herein, the United States of America, respectfully petitions this Honorable Court for a rehearing of this cause upon the following ground:

I.

The Court erred in holding that the indictment in this cause should have been quashed.

ARGUMENT

The Court states in its opinion that the indictment charges only that appellant registered and was classified by the board as a conscientious objector found fit for general service. The Court then concludes that the appellant would be in what the Court calls "class (b)". What the Court refers to in its opinion as class (b) is class 1-A-0 under the Selective Service Act. We respectfully submit that the Court is in error in this conclusion.

The words "found fit for general service" in the Selective Service Act and the Regulations, and as used in the indictment, have reference only to the physical condition of a registrant. They have no meaning at all with reference to military service or work of national importance under civilian direction. This is clear from a review of the Selective Service Regulations.

The words "general service" are used in the Regulations in connection with the words "limited service". The Regulations originally provided that certain registrants should be placed in 1-A if they were found fit "for *general* military service according to the standards prescribed in Volume Six, Physical Standards." (See Para. 342 of First Edition of Selective Service Regulations.) The Regulations originally provided that certain registrants should be placed in 1-B if they were found fit "for *limited* military service" according to the same physical standards. (See Para. 343 of the First Edition of the Selective Service Regulations.) Amendment No. 72, effective June 13, 1941, to Para. 365 of the Regulations provided that certain registrants should be placed in Class IV-E if, after physical examination, they are found "fit for general military service," and in Class IV-E (limited service) if, after

physical examination, they are found "fit only for limited military service." (See Fed. Reg. Vol. 6, p. 2908.)

Amendment No. 102 revised Paragraph 364 as previously revised by Amendment No. 72. (See Fed. Reg. Vol. 6, p. 4252, Aug. 21, 1941.) As amended, Paragraph 365 provided that in Class IV-E should be placed certain registrants found to be "fit for general service" and in Class IV-E-LS should be placed certain registrants found to be "fit only for limited service."

The allegation in the indictment, that the appellant was classified as a conscientious objector and found fit for general service, would, standing by itself, place him in either a I-A-0 classification or a IV-E classification. Any uncertainty that might arise by reason of this allegation is removed by the allegation in the indictment that the appellant *was ordered to report as a conscientious objector for civilian work of national importance.* The foregoing allegations clearly place appellant in Class IV-E. The phrase "conscientious objector" is the usual, common manner of referring to one placed in Class IV-E. Nowhere in the record has the appellant claimed there was any uncertainty in this indictment as to the classification of appellant. Had the appellant claimed any uncertainty, it could have been corrected by a bill of particulars.

Since it is alleged in the indictment that the appellant is charged with the duty of reporting for work of national importance when notified so to do, it is not fatal that the indictment does not specify in detail the classification of the appellant, his age and residence, and the absence of factors which would exempt him from the operation of the Act. The allegation in the indictment, charging appellant with failure to perform

that duty and failure to report for work of national importance as required of him under the Act, necessarily includes the charge that he is within the proper age group, that he is not exempt because of citizenship, and that he was classified in IV-E. There is a presumption that a public officer has properly performed his duties. When the board ordered appellant to report for work of national importance, there was a presumption that they had authority and jurisdiction to so order. The allegation of the ultimate fact was all that was necessary.

The authorities are practically unanimous in holding that one must obey an order of the board, and the question of the legality of such order cannot be raised in a prosecution for failure to obey. The only method of determining the legality of one's detention for failure to obey such an order is by habeas corpus. In other words, the facts, which the opinion in this case say must be alleged in the indictment, are purely defensive matters which are controverted by the allegations in the indictment in this case. *Ex parte Stewart, 47 Fed. Sup. 415,* and authorities therein cited, and authorities cited in Appellee's Brief.

The general rule is that if the language of a statute is sufficient to apprise the accused, with reasonable certainty, of the nature of the accusation against him, an indictment drawn in that language is sufficient. See *United States v. Henderson* (C.C.A.D.C., 1941) 121 F. (2d) 75; *Potter v. United States,* 155 U.S. 438; *Summers v. United States,* (C.C.A. 4, 1926) 11 F. (2d) 583, certiorari denied 271 U.S. 681. The indictment in this case follows the language of the statute.

This indictment fairly informs the accused of the charge which he is required to meet and is sufficiently

specific to avoid the danger of hs again being prosecuted for the same offense. Consequently, it should not be held insufficient. See *Hewitt v. United States,* (C.C.A. 8, 1940) 110 F. (2d) 1, 6; *Hagner v. United States,* 285 U.S. 427, 431; *Beard v. United States,* (App. D.C.) 82 F. (2d) 837, 840; (and authorities cited Appellee's Brief).

The foregoing conclusions are positively indicated by the fact that the appellant never, at any stage of the proceedings, raised any of the questions upon which this Court reversed the judgment. We urge a rehearing in this case for the very good reason that the Government has never had the opportunity to present its views on these questions. In the record in the trial court, in the briefs on appeal, and in the argument before this Court, there is not one word of discussion on the points which were first raised and sustained by the opinion in this case.

We have not attempted in this petition to exhaust either the authorities or the argument in support of the Government's theory. We should like the opportunity of presenting our position fully at a rehearing.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney,

Attorneys for Appellee.

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APPLICATION FOR STAY OF ISSUANCE OF MANDATE

TO THE HONORABLE WILLIAM DENMAN, CLIFTON MATHEWS, AND ALBERT LEE STEPHENS, ASSOCIATE JUDGES OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT:

In the event that this petition for rehearing should be denied, it is the purpose and desire of appellee to apply to the Supreme Court of the United States for issuance of a Writ of Certiorari, and for that reason application is hereby made for a stay of the issuance

of mandate of this Honorable Court pending the presentation and determination of such petition for Writ of Certiorari.

DATED at Phoenix, Arizona, this 12 day of January, 1943.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney,

Attorneys for Appellee.

CERTIFICATE OF COUNSEL

I, FRANK E. FLYNN, United States Attorney for the District of Arizona and attorney for appellee, do certify that in my opinion the foregoing Petition for Rehearing is well founded and meritorious and that neither said Petition nor said Application for Stay of Issuance of Mandate are interposed for the purpose of delay.

DATED at Phoenix, Arizona, this 12 day of January, 1943.

FRANK E. FLYNN,
United States Attorney,
District of Arizona.
Attorney for Appelle.